

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

September 6, 1995

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

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No. 95-0661

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

IN RE THE PATERNITY OF JORDAN A. F.:

STATE OF WISCONSIN,

Petitioner-Appellant,

v.

LARRY W. W.,

Respondent-Respondent.

APPEAL from an order of the circuit court for Door County:
JOHN D. KOEHN, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

MYSE, J. The State of Wisconsin appeals a child support order that established child support after excluding certain military entitlements received by Larry W. W., the adjudicated father of Jordan A. F. The State contends that the trial court erred when it excluded certain military entitlements from Larry W.'s gross income for the purpose of calculating child support payments. Because we conclude that these military entitlements were not within the definition of gross income as that term was defined by the

Department of Health and Social Services at the time of the court's order, we affirm the trial court.

Larry W. is currently a member of the armed forces and receives in addition to his military pay certain military entitlements such as basic allowance for quarters, which is an allowance for housing; basic allowance for subsistence, which is an allowance for off-base meals; and variable housing allowance, which is an allowance to offset the high cost of living and is adjusted depending on the location of the base to which Larry is assigned.

In this action, Larry was adjudicated the father of Jordan A. F. and was directed to pay 17% of his gross income as child support, totaling \$320 per month. In determining Larry's gross income, the trial court excluded his military allowances.

The sole issue presented is whether the definition of gross income in WIS. ADMIN. CODE § HSS 80.02(12) (August 1987), included Larry's military allowances. The interpretation of ch. HSS 80 in determining child support presents a question of law that we determine without deference to the trial court. *Gohde v. Gohde*, 181 Wis.2d 770, 774, 512 N.W.2d 199, 201 (Ct. App. 1993).

Section 46.25(9)(a), STATS., requires the Department of Health and Social Services to adopt and publish standards for courts to use in determining child support obligations. The department defined gross income for the purpose of calculating child support obligations in WIS. ADMIN. CODE § HSS 80.02(12), as follows:

"Gross income" means all income as defined under 26 C.F.R. 1.61-1 that is derived from any source and realized in any form, whether money, property or services, and whether reported as total income on the payer's federal tax return or exempt from being taxed under federal law.

Under the department's definition, we must examine the definition of gross income established by 26 C.F.R. § 1.61-1 (1995). That regulation defines gross income as follows: "Gross income means all income from whatever source derived, unless excluded by law." The source of this definition is the Department of Treasury, which defined gross income for internal revenue purposes. Therefore, we look to the Internal Revenue Code to determine whether the allowances in question are "gross income." If there is no exclusion from gross income in the Internal Revenue Code, the allowances fit the definition of income as defined by the Department of Health and Social Services. If, however, the allowances are excluded from gross income by the Internal Revenue Code, they do not fit the definition of gross income established by § HSS 80.02.

In the Internal Revenue Code, I.R.C. § 134(a), (West Supp. 1995), provides: "Gross income shall not include any qualified military benefit." I.R.C. § 134(b), defines qualified military benefit as:

- (1) ... any allowance or in-kind benefit ... which —
- (A) is received by any member or former member of the uniformed services of the United States ... and
- (B) was excludable from gross income on September 9, 1986, under any provision of law, regulation, or administrative practice which was in effect on such date (other than a provision of this title).

To determine whether the military benefits received by Larry were excluded from gross income under the regulations as of September 9, 1986, we examine 26 C.F.R. 1.61-2(b) (1986). This section provides: "[s]ubsistence and uniform allowances granted commissioned officers, chief warrant officers, warrant officers, and enlisted personnel of the Armed Forces ... and amounts received by them as commutation of quarters, are to be excluded from gross income." Because Larry's military allowances are for subsistence and quarters, they fall under the regulation and therefore are excluded from gross income under I.R.C. § 134.

Because I.R.C. § 134 excludes from gross income the type of military benefits at issue here, the benefits are excluded under the definition of gross income in C.F.R. 1.61-1. We therefore conclude that the military benefits

in question are not included as gross income for the purpose of calculating child support under the law of the state of Wisconsin as it existed at the time of this determination.

The State argues that § HSS 80.02(12), states that gross income includes all income whether taxable or not and therefore it does not matter if the benefits were excluded from gross income by the Internal Revenue Code. The State relies on the language: "whether reported as total income on the payer's federal tax return or exempt from being taxed under federal law." "Whether reported as total income on the payer's federal tax return" refers to the fact that it does not matter if the taxpayer actually included the income on his tax return or not; if it fits the definition in 1.61-1, it is included in gross income. The phrase "or exempt from being taxed under federal law" refers to adjustments to gross income which are not taxed. The amount that is untaxed is still included in gross income for child support purposes. Therefore, this additional language in § HSS 80.02 does not make the definition of gross income in § HSS 80.02 different than the definition in 1.61-1. This conclusion is supported by *Grohmann v. Grohmann*, 189 Wis.2d 532, 538, 525 N.W.2d 261, 263 (1995) (interpreting gross income under WIS. ADMIN. CODE § HSS 80.02(12) to include income from trusts). In *Grohmann*, the supreme court held that the definitions of gross income in § HSS 80.02(12) and 26 C.F.R. 1.61-1 are synonymous and that it would be illogical for the two sections to have different meanings. *Id.*

The State further argues that the Department of Health and Social Services intended to include military benefits as gross income for purposes of calculating child support because § HSS 80.02 has been amended to specifically include military allowances and veterans benefits as of March 1995. We cannot speculate on the intent of the department if the administrative rules expressing that intent are clear and unambiguous. *In re J.A.L.*, 162 Wis.2d 940, 962, 471 N.W.2d 493, 502 (1991); see *Basinas v. State*, 104 Wis.2d 539, 546, 312 N.W.2d 483, 486 (1981) (construction of administrative rules is governed by same principles that apply to statutes). We may not look beyond the clear provisions of unambiguous statutes and administrative rules to determine the intent of the department because it is presumed that the language itself accurately reflects the intent. *J.A.L.*, 162 Wis.2d at 962, 471 N.W.2d at 502.

In this case, the definition of gross income in § HSS 80.02(12) is very specific and incorporates that definition reflected by C.F.R. 1.61-1. The relevant provisions of C.F.R. and I.R.C. § 134 are also unambiguous. Because

the military benefits in question are excluded from gross income under the provisions of the Internal Revenue Code, they are not gross income under the clear and unambiguous provisions of ch. HSS 80.

The State further argues that the majority of the seven states that have addressed this issue have resolved the issue in favor of including such entitlements as part of gross income for the purpose of determining child support. The conclusion reached by courts of other jurisdictions dealing with definitions other than those applicable in the State of Wisconsin are not persuasive precedent. Each state has its own definition and we are required to apply the definition adopted by the State of Wisconsin. Because Wisconsin's definition is clear and unambiguous, we cannot look to the conclusions that other states applying different definitions have made concerning this issue.

We note that in March 1995, the department amended the definition of gross income to include military allowances and veteran's benefits. Although the issue of what military allowances encompass is not before us, we note the change in law for the purpose of calling attention to the fact that the definition contained in the administrative code at the time of this order has been altered.¹ Accordingly, this case is not authority on whether these types of military entitlements are included as gross income for the purpose of determining child support as of March 1995.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

¹ The trial court's order was entered on February 10, 1995.